Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1811

ROBERT J. TRACY,

Appellant,

-vs-

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE
TENTH DISTRICT COURT OF APPEALS
FRANKLIN COUNTY, OHIO

MOTION TO DISMISS

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BRIEF IN SUPPORT OF MOTION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A STATE STATUTE REGULATING THE ADMISSIBILITY OF EVIDENCE OF OTHER ACTS OF A DEFENDANT AS BEARING UPON PROOF OF MOTIVE OR INTENT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

II. WHETHER A STATE MAY ENACT LAWS GOVERNING THE ADMISSIBILITY OF EVIDENCE ON THE BASIS OF MATERIALITY AND RELEVANCY WITHOUT VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Fourteen, United States Constitution
Section 2945.59, Ohio Revised Code
Section 2907.02, Ohio Revised Code
(Set forth in Appendix, pages 7, 9)

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No. 76-1811

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STATE OF OHIO,
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ON APPEAL FROM THE TENTH DISTRICT COURT OF APPEALS FRANKLIN COUNTY, OHIO

MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of this Court, Appellee, the State of Ohio, moves the Court to dismiss the within appeal as not presenting a substantial federal question as well as upon the grounds that the question sought to be reviewed was not timely nor properly raised and was not expressly passed on by the court below.

BRIEF IN SUPPORT OF MOTION

STATEMENT OF THE CASE

Appellant was indicted September 23, 1975, on charges of rape and aggravated burglary. The offense occurred on August 15, 1975. Trial date was set for November 5, 1975, but continued at appellant's request. On December 8 and 9, 1975, appellant was tried before a jury which returned guilty verdicts on both counts.

The victim, who knew the appellant, testified that she was awaked in her bedroom by appellant who threatened her with a knife and then raped her. The appellant stated to the victim ". . . that if he was going to jail on what he had done to his daughter, that he was going to do it to me, too." The victim had previously reported appellant to police after overhearing appellant ask his daughter to perform an oral sex act with appellant.

Police officers were called to the scene. The victim was visably shaken. A knife found in the bedroom was admitted in evidence. Following a physical examination of the victim, semen was found to be present. Entry to the home was made by removing a screen on a downstairs window. Muddy tracks led from the entry point to the victim's bedroom.

On appeal, the conviction was affirmed by unanimous panel in the Tenth District Court of Appeals of Ohio. Further review was denied by the Ohio Supreme Court and appellant now seeks review by this Court.

ARGUMENT

I. Appellant seeks to invoke the jurisdiction of the Supreme Court as provided in Title 28, United States Code, Section 1257(2). We note in response that at no stage of the proceedings below was the constitutionality of Section 2907.02, Ohio Revised Code, drawn in question. The ruling of the Tenth District Court of Appeals of Ohio (set forth in appellant's jurisdictional statement at page A-10) passed only on those questions raised and did not pass upon the constitutionality of that statute. Additionally, no substantial federal question was presented below or in the within appeal.

As stated by the Court of Appeals below, the amend-

ment of Section 2907.02, Ohio Revised Code, did not change the law of Ohio, with respect to admissibility of evidence: ". . . evidence which is not material to a fact at issue in the case is not admissible regardless of the nature of the evidence." (Appellant's brief, appendix, page A-14)

It is important to note the difference between the evidence appellant sought to introduce regarding the victim, and evidence regarding appellant's prior act introduced under an entirely different statute: Section 2945.59, Ohio Revised Code. As stated by the Court of Appeals of Ohio, "[d]efendant wished to present evidence that the victim had previously been raped by an unknown assailant and reported this fact to police. Obviously, such evidence would not be material to the issues in this case, having no bearing either upon the guilt of the defendant or upon the credibility of the victim." (Appellant's appendix, page A-16)

Immediately thereafter, the court below reviewed the separate and distinct issue of admissibility of evidence of the reporting of appellant's prior act or conduct, as bearing upon the issue of motive. It was on that issue that the court stated that guilt or innocence of the other act was immaterial to the issue of the case. The fact that the victim had *reported* the incident to police was held material as bearing upon motive; citing Section 2945.59, Ohio Revised Code. (Appendix, page 9)

It has long been established that the courts have broad latitude in admitting evidence tending to establish a defendant's motive for committing a particular offense. *Moore v. Texas* (1893), 150 U.S. 57 at 61. See *Lisenba v. California* (1941), 314 U.S. 219 at

227; *Nye & Nissen v. United States* (1949), 336 U.S. 613; *Anderson v. Maryland* (1976), ... U.S. ..., 96 S. Ct. 2737; *United States v. Baumgarden*, (C.A. 8th, 1975), 517 F. 2d 1020, cert. denied, ... U.S. ..., 96 S. Ct. 152.

The admissibility of evidence under that well-recognized rule, (codified in Ohio as Section 2945.59, Revised Code), has been described as ". . . a concededly non-constitutional issue of the admissibility of certain evidence under a state statute." *Klein v. Cardwell* (C.A. 6, 1971), 448 F. 2d 407, 408. A comparable provision for admissibility of such evidence is contained in Rule 404(B) of the Federal Rules of Evidence.

Appellant's subsequent acquittal on the charges regarding his daughter does not render such evidence inadmissible in the within prosecution. There need be no prosecution, much less conviction, before such evidence, if relevant and material, is admissible in a criminal case. Even prior acquittal of the similar offense sought to be proved does not preclude admissibility of that evidence in a subsequent prosecution. *United States v. Addington* (C.A. 10, 1973), 471 F. 2d 560; *Hernandez v. United States* (C.A. 9, 1966), 370 F. 2d 171; *United States v. Castro-Castro* (C.A. 9, 1972), 464 F. 2d 336, cert. denied 410 U.S. 916; c.f. *United States v. Woods* (C.A. 4, 1973), 484 F. 2d 127, cert. denied 415 U.S. 979. There is no issue of collateral estoppel as in *Ashe v. Swenson* (1970), 397 U.S. 436.

CONCLUSION

It is respectfully submitted that the within appeal has been improvidently taken under Title 28 United States Code, Section 1257(2), and that therefore, this Court lacks jurisdiction. The constitutionality of the statutes of Ohio has not been drawn in question and the ruling below did not pass on that issue. Appellant does not suggest that the statutes are constitutionally infirm.

The judgment of the Court of Appeals of Ohio, Tenth Appellate District, rests on adequate state grounds and presents no federal question of substance. The appeal, therefore, should be dismissed.

Reviewing the appeal as a petition for a writ of certiorari pursuant to Title 28, United States Code, Section 2103, it is respectfully submitted that in light of the decisions of this Court and those courts of the several jurisdictions cited within, that the writ of certiorari should not issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(b) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing

motion to dismiss were served upon George B. Gloeckner, 534 South Pearl Street, Columbus, Ohio 43215; counsel for appellant, this ... day of July, 1977 and that all parties required to be served have been served.

ALAN C. TRAVIS
Assistant Prosecuting Attorney
Counsel for Appellee

APPENDIX

SECTION 2907.02, OHIO REVISED CODE

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

APPENDIX

SECTION 2945.59, OHIO REVISED CODE

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.